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Supreme Court, U.S.
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No. 04-49

IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,

Petitioner,

v.

SECURITY INSURANCE COMPANY OF HARTFORD;
TRUSTMARK INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT SECURITY INSURANCE COMPANY OF HARTFORD IN OPPOSITION

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QUESTION PRESENTED

Section 1281.2(c)(4) of the California Civil Procedure Code permits a court to stay an arbitration pending resolution of a related court action. Recognizing that "the interpretation of private contracts is ordinarily a question of *state* law," this Court in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989) (emphasis added), held that California law governs whether a California choice-of-law provision incorporates California arbitration rules such as Section 1281.2(c)(4), and that neither the Federal Arbitration Act nor the federal policy favoring arbitration requires a choice-of-law provision to be read to *exclude* Section 1281.2(c)(4) from a choice-of-law provision. *Id.* at 476.

The arbitration agreement in this case contains a California choice-of-law provision. The district court and court of appeals held that, under California law, this choice-of-law provision incorporates Section 1281.2(c)(4), and that—as this Court squarely held in *Volt*—neither the FAA nor the federal policy favoring arbitration compelled a different interpretation. The question presented is whether the court of appeals correctly interpreted and applied California law in construing the parties' choice-of-law provision.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties.

RULE 29.6 STATEMENT

The parent company of respondent Security Insurance Company of Hartford is Royal & SunAlliance Insurance Group plc, a publicly traded company.

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BRIEF FOR RESPONDENT SECURITY INSURANCE COMPANY OF HARTFORD IN OPPOSITION

Respondent Security Insurance Company of Hartford respectfully submits this brief in opposition to the certiorari petition filed by TIG Insurance Company.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 360 F.3d 322 (2d Cir. 2004). The opinion and order of the district court granting respondent Security Insurance Company of Hartford's motion to stay the arbitration (Pet. App. 13a-28a) is reported at 283 F. Supp. 2d 602 (D. Conn. 2003).

JURISDICTION

The judgment below was entered on March 2, 2004. Pet. App. la. A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on May 20, 2004. Pet. App. 31a-32a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Reinsurance Agreement. In 1998, petitioner TIG Insurance Company ("TIG") purchased through WEB Management LLC ("WEB") reinsurance for its workers' compensation policies. WEB was an agent for respondent Trustmark Insurance Company ("Trustmark"), which had authorized WEB to issue reinsurance contracts on its behalf.

For licensing reasons not relevant here, Trustmark could not reinsure 100% of TIG's exposure under its workers' compensation policies. To make the reinsurance it was marketing more attractive, WEB recruited respondent Security Insurance Company of Hartford ("Security") to act as a "fronting company" for Trustmark. Under this

arrangement, WEB would issue a reinsurance contract to TIG (on behalf of Security) that covered 100% of TIG's exposure under its workers' compensation policies. WEB would simultaneously issue (on behalf of Trustmark) a "retrocessional" reinsurance contract to Security that would cover most of Security's liability to TIG.

In 1999, TIG cancelled its 1998 policy and replaced it with a new policy (the "Reinsurance Agreement") issued by WEB on behalf of Security. Thereafter, WEB issued a retrocessional reinsurance contract (the "Retrocession Agreement") to Security on behalf of Trustmark.

In negotiating the Reinsurance Agreement, TIG insisted that it be made subject to California law. Article XVIII ("Governing Law") of the Reinsurance Agreement accordingly provides:

> This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail.

Pet. App. 2a. The Reinsurance Agreement also provides for arbitration of "any irreconcilable dispute between the parties to this Agreement." Pet. App. 35a. The Retrocession Agreement does not contain an arbitration clause.

B. The Dispute And Federal Court Action. TIG's workers' compensation policies suffered large losses that, under the Reinsurance and Retrocession Agreements, flowed from TIG through Security to Trustmark. Rather than honor its reinsurance obligations, Trustmark asserted that TIG had

fraudulently induced the Reinsurance Agreement by making material misrepresentations to Security through WEB, and it rescinded the Retrocession Agreement. The next day, Security filed suit against Trustmark in the United States District Court for the District of Connecticut (the "federal court action"), seeking a declaration that the Retrocession Agreement was valid and enforceable. Trustmark was granted leave to add TIG as a third-party defendant in the federal court action.

C. The Arbitration. With Trustmark refusing to pay Security's claims under the Retrocession Agreement, Security in turn suspended its payments to TIG and requested that TIG provide information necessary for Security to investigate Trustmark's allegations. TIG, in turn, initiated arbitration against Security. In its arbitration demand, TIG sought a declaration that the Reinsurance Agreement was valid and enforceable and that TIG had not fraudulently induced it. The day after it filed for arbitration, TIG moved to stay the federal court action pending the outcome of the arbitration. The district court denied that motion.

The arbitration panel scheduled the arbitration hearing for August 2003, whereas the district court scheduled a tentative trial date in October 2003. Prompted by the recognition that it could be subjected to inconsistent rulings in the two proceedings, Security moved the arbitration panel to postpone the arbitration until after the trial in the federal court action. Pet. App. 28a. The panel denied that motion without explanation. Pet. App. 29a.

D. The Decisions Below. On June 4, 2003, Security moved the district court to stay the arbitration pending completion of the federal court action. Security contended that the choice-of-law provision in the Reinsurance Agreement reflected the parties' intention to incorporate California arbitration law—including Cal. Civ. Proc. Code

§ 1281.2(c)(4), which authorizes courts to stay an arbitration pending resolution of a related court action.[1]

The district court granted the motion. Pet. App. 28a. Relying on this Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989)—which involved the identical California statute—the district court recognized that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules" (283 F. Supp. 2d at 605 (quoting *Volt*, 489 U.S. at 476)) and that "[i]f the parties so intend it," state arbitration rules will govern the parties' arbitration, because private parties have the "ability to contract around the FAA." *Id.* at 607-08. The district court reasoned that because "'the interpretation of private contracts is ordinarily a question of state law'" (283 F. Supp. 2d at 607 (quoting *Volt*, 489 U.S. at 474)), and because "state law provides the tools by which the intent of the parties is ascertained," the case was controlled by "fundamental principles of contract interpretation under . . . California state law." *Id.* After exhaustively reviewing California authorities (*see id.* at 607-10), the district court determined that the parties had intended to incorporate state arbitration rules such as Cal. Civ. Proc. Code § 1281.2(c)(4) as part of their arbitration agreement.

The district court rejected TIG's contention that *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), compelled a different result, noting that *Mastrobuono* turned on "the proper application of New York law," not California law, and that the state law arguably incorporated into the arbitration agreement by the choice-of-law clause at

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[1] Section 1281.2(c)(4) provides in relevant part that "[i]f the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party . . . the court . . . (4) may stay arbitration pending the outcome of the court action or special proceeding."

issue in *Mastrobuono* was hostile to arbitration, whereas Cal. Civ. Proc. Code § 1281.2, as this Court ruled in *Volt*, did not "'undermine the goals or policies of the FAA,'" but instead "'foster[ed] the federal policy favoring arbitration.'" 283 F. Supp. 2d at 610 (quoting *Volt*, 489 U.S. at 472).

The court of appeals affirmed.[2] Like the district court, the court of appeals recognized that, under *Volt*, the key question was "whether the choice-of-law provision reveals the intention of TIG and Security to incorporate California's procedural arbitration rules . . . into the contract"—a question governed by "California law." Pet. App. 7a. Like the district court, the court of appeals also concluded that "the California Supreme Court would rule that the choice-of-law provision did incorporate the state's procedural rules for arbitration." *Id.* at 11a. And like the district court, the court of appeals rejected TIG's suggestion that *Mastrobuono* "altered *Volt*'s directive with regard to analyzing choice-of-law clauses," because *Mastrobuono* involved "New York not California law" and because the state arbitration rule at issue in *Mastrobuono* placed "restrictions on the parties' substantive rights," whereas Cal. Civ. Proc. Code § 1281.2(c)(4), as this Court held in *Volt*, was fully consistent with federal arbitration policy.

ARGUMENT

The decision below is a straightforward and faithful application of this Court's arbitration precedents. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), this Court expressly held that *state* law determines whether a choice-of-law provision incorporates a state arbitration rule such as

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[2] The district court entered its decision on August 5, 2003. The next day, TIG appealed the order and asked the Second Circuit to stay proceedings in the district court pending disposition of the appeal. The court of appeals granted the stay, which was dissolved in connection with the court's disposition of the merits.

California Civil Procedure Code § 1281.2(c)(4), and that neither the Federal Arbitration Act nor the liberal federal policy favoring arbitration bars a court from construing a general choice-of-law provision to incorporate such a state arbitration rule.

This Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), did not purport to undermine *Volt*. In *Mastrobuono*, this Court applied New York law to a brokerage agreement and concluded that a choice-of-law provision did not—given the particular ambiguities in the contract in question—incorporate a New York rule precluding an arbitrator from awarding punitive damages. *Mastrobuono* was grounded entirely in the particular terms of the contract before the Court; it did *not* usher in a new rule of *federal* law that prohibits courts from construing choice-of-law provisions to encompass state arbitration rules.

In this case, the court of appeals concluded that, as a matter of California law, the choice-of-law provision at issue here incorporates California arbitration rules, including Section 1281.2(c)(4). That holding rested squarely on the court of appeals' construction of California law. The court of appeals also held that its interpretation of the choice-of-law provision was fully consistent with the FAA. That holding is entirely sound—indeed, it is *precisely* the same holding, regarding the *same* incorporated state law rule, reached by this Court in *Volt*. Because *Mastrobuono* did not purport to modify *Volt* and otherwise says nothing about how the contract at issue in *this* case should be interpreted, the court of appeals correctly concluded that *Mastrobuono* did not compel a different result. The decision below is entirely in accord with this Court's precedents.

Petitioner's claim that there is a "deep and persistent conflict" among the lower courts over whether "a general choice-of-law provision incorporates state-law arbitration

rules" (Pet. 14) is overblown and inaccurate. The lower courts have not reached conflicting decisions on the scope of choice-of-law provisions because of any disagreements over *federal* law. The various purported "conflicts" recited by the petition arise because the lower courts in those cases, following the teachings of *Volt* and *Mastrobuono*, applied *different* bodies of state contract law to *different* arbitration agreements. These "conflicts" do not warrant this Court's attention, because "this Court does not sit to review" questions of state law. *Volt*, 489 U.S. at 474; *see also Dixon v. Duffy*, 344 U.S. 143, 144 (1952) ("This Court, of course, does not sit to determine matters of state law.").

Moreover, this case does not, as petitioner contends, involve a "general" choice-of-law clause. As the court of appeals recognized, the choice-of-law provision in the Reinsurance Agreement contains express exceptions that make California law *in*applicable in certain circumstances, suggesting that, had the parties intended *not* to be bound by California arbitration rules, they would have said so explicitly. Pet. App. 11a. The inferences that can be drawn about the parties' intent from such a provision differ fundamentally from the inferences that can be drawn from a "general" choice-of-law clause. Accordingly, this case does not conflict with those decisions cited in the petition that involve "*general* choice-of-law provision[s]." Pet. (i) (emphasis added).

In any event, even if the cases petitioner cites *could* be read as holding that *Mastrobuono* announced a new *federal* rule of contract interpretation applicable to choice-of-law provisions, no conflict exists that would warrant this Court's review. The lower courts that have taken a more circumscribed view of choice-of-law provisions were motivated by the concern that the particular state arbitration rules that were claimed to be incorporated by a choice-of-law provision would, as in *Mastrobuono*, be preempted by the

FAA if the state rule applied of its own force, rather than by virtue of a choice-of-law clause. That concern is not present here, because this Court has already determined that the California statute at issue here is fully consistent with the FAA. As this Court recognized in *Volt*, Cal. Civ. Proc. Code § 1281.2(c)(4) "foster[s] the federal policy favoring arbitration." 489 U.S. at 488 & n.5. Indeed, this Court has *repeatedly* reaffirmed that conclusion. *See EEOC v. Waffle House*, 534 U.S. 279, 294 & n.9 (2002); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). The decision below therefore does not "conflict" with decisions in which courts have held that other choice-of-law provisions do not incorporate state arbitration rules that are contrary to federal arbitration policy.

The petition should be denied.

I. The Decision Below Correctly Applies This Court's Decisions In *Volt* And *Mastrobuono*.

The court of appeals' determination that the parties' choice-of-law provision incorporates Cal. Civ. Proc. Code § 1281.2(c)(4) represents an entirely appropriate application of this Court's decisions in *Volt* and *Mastrobuono*.

1. *Volt* required this Court to decide whether the inclusion of a choice-of-law provision in an arbitration agreement expressed the parties' intention to be governed by a state rule of arbitration (in particular, Cal. Civ. Proc. Code § 1281.2(c)(4), the same provision at issue in this case), and, if so, whether the FAA or the federal policy favoring arbitration preempted the state arbitration law rule. The case came to the Court on appeal from a California Court of Appeal, which had held that the parties had agreed to be bound by California arbitration rules and that Section 1281.2(c)(4) was not preempted by the FAA.

With respect to the first issue, the Court declined to revisit the California Court of Appeal's determination that

the choice-of-law clause incorporated Section 1281.2(c)(4), noting that "the interpretation of private contracts is ordinarily a question of state law." 489 U.S. at 474-75. The Court then went on to consider whether the California "Court of Appeal's construction of the choice-of-law clause . . . violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* at 475 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).[3]

The Court found no conflict between the Court of Appeal's interpretation of the choice-of-law clause and the *Moses H. Cone* principle. *See* 489 U.S. at 476. Indeed, the Court stated that it would be inimical to the purposes of the FAA to deny the parties the ability to choose the terms under which they will arbitrate, because under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479. As the Court concluded:

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.

489 U.S. at 476. The same reasons also led the Court to conclude that Section 1281.2(c)(4) was not preempted by the FAA. *Id.* at 480.

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[3] This rule mandates that "in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . , due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Id.* at 475-76 (citing *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

2. *Mastrobuono*, by contrast, addressed whether, under New York law, a choice-of-law provision in an arbitration agreement between a securities broker-dealer and its customers incorporated a New York law (the *Garrity* rule) that precluded arbitrators from awarding punitive damages. 514 U.S. at 53-54. The parties' agreement called for arbitration to be conducted pursuant to NASD rules, which authorize arbitrators to award punitive damages, but the choice-of-law provision's incorporation of the *Garrity* rule would have foreclosed such relief. *See id.* at 54-55.

Confronted with this ambiguity, the Court turned to state-law principles of contract interpretation to determine "what the contract has to say." 514 U.S. at 58. Indeed, the Court called attention to the fact that it applied "precedent from Illinois, the forum State and place where the contract was executed, and New York, the State designated in the contract's choice-of-law clause," because "[t]he parties suggest no other State's law as arguably relevant to this controversy." *Id.* at 63 n.9.

Applying the state-law principles that ambiguities in the contract should be construed against the drafter, and that a contract "should be read to give effect to all of its provisions and to render them consistent with each other," the Court concluded that the choice-of-law provision could not be read as expressing a clear intent to incorporate the *Garrity* rule without creating an inconsistency with the contract's reference to NASD rules. *Id.* at 64 (this "reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.") Only by interpreting the choice-of-law provision to incorporate New York's substantive law, and not its arbitration law, could all of the contract's provisions be given meaning and rendered consistent with one another. *Id.* at 64. The Court observed that this approach was consistent with the *Moses H. Cone*

principle of construing arbitration agreements with "due regard" for the "federal policy favoring arbitration." 514 U.S. at 62.[4]

3. In the court below, petitioner contended that *Mastrobuono* modified *Volt* by declaring—as a matter of *federal* law—that a general choice-of-law clause does not incorporate state arbitration rules. That contention is incorrect. *Mastrobuono* applied state-law contract principles to interpret the agreement before it; it did not usher in a new federal principle that displaces the role of state law in interpreting choice-of-law provisions.

To be sure, *Mastrobuono* and *Volt* reach different "outcomes" in that *Volt* determined that a choice-of-law clause incorporated a state arbitration rule, whereas *Mastrobuono* concluded that the choice-of-law clause in that case did not. But these outcomes are attributable entirely to the differences in the contracts before the Court and the requirements of the different state-law principles applicable to them. Indeed, *Mastrobuono* expressly recognized the primacy of state law in interpreting choice-of-law provisions by noting that *Volt* properly deferred to the California Court of Appeal's construction of the choice-of-law provision—a deference that would have been *inappropriate* if contract interpretation were a matter of federal law. This Court

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[4] Although the Court's ruling ultimately turned on state-law questions of contract interpretation, this Court did not grant certiorari on those issues. Rather, the court of appeals' ruling that this Court accepted for review appeared to raise a significant question of *federal* law—*i.e.*, whether parties may, by contract, override rules promulgated by the NASD. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713 (7th Cir. 1994). Upon closer inquiry, this Court concluded that the particular NASD rule at issue had not yet been promulgated at the time of the relevant events. *Mastrobuono*, 514 U.S. at 61 n.6 (noting that NASD Rule 21(f)(4) is "not applicable to this case"); Brief for the United States and SEC as *Amici Curiae*, at 7 (noting that because Rule 21(f)(4) was not yet effective, "[t]his case consequently presents a question of contract interpretation, not of preemption by federal securities law").

recently reaffirmed this conclusion in stating that "*Volt* and *Mastrobuono* both direct courts to respect the terms of the agreement *without* regard to the federal policy favoring arbitration." *Waffle House*, 534 U.S. at 294 & n.9 (emphasis added).

In the decision below, the court of appeals correctly adhered to these principles. It applied California law to determine whether the parties' choice-of-law provision incorporated Cal. Civ. Proc. Code § 1281.2(c)(4) (Pet. App. 21a-26a), and—following this Court's holding in *Volt*—concluded that neither the FAA nor the federal policy favoring arbitration compelled a different result. That decision is unassailably correct.

II. The Decision Below Does Not Conflict With The Decisions Of Other Federal Courts On An Issue Of Federal Law.

1. In the wake of *Volt* and *Mastrobuono*, the lower courts have consistently consulted state law to determine whether choice-of-law provisions set forth in arbitration agreements governed by the FAA incorporate state arbitration standards. Not surprisingly, given variations in state law and in the relevant contractual language across these cases, the lower courts have reached different conclusions about whether a choice-of-law clause in any particular case has the effect of incorporating state arbitration rules.

The petition contends that these differences evidence a "deep" and "mature" conflict on an issue of *federal* law regarding "general" choice-of-law clauses. But that contention is inaccurate: the "conflicts" recited in the petition have nothing to do with federal law. Instead, these differences reflect the inevitable result of federal courts applying different *state* laws to the particular contractual language used by the parties in any given case to express

their intentions, and do not raise any issue worthy of this Court's attention. *See Dixon*, 344 U.S. at 144. Indeed, even if petitioner's premise were correct, this case would not be an appropriate vehicle to resolve the alleged "conflict," since—as the court below recognized—there is nothing "general" about the uniquely broad and well-defined choice-of-law provision at issue here.

For example, the petition prominently features *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), as a decision that "conflicts" with the decision below on a question of federal law. *See* Pet. 16. Indeed, the petition breathlessly asserts that "*Wolsey* underscores the importance of the conflict among the courts of appeals" because it held that a California choice-of-law provision did *not* incorporate Section 1281.2(c) of the California Civil Procedure Code—"the very same California statute at issue in this case." Pet. 17. But the asserted "conflict" between *Wolsey* and the decision below rests entirely on a disagreement about the meaning of California law.

Like the court of appeals in this case, *Wolsey* expressly applied "ordinary state-law principles" (144 F.3d at 1210) to interpret the parties' agreement.[5] Indeed, *Wolsey* criticized the district court for relying on the parties' post-dispute conduct as a guide to their intentions about incorporating

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[5] As the court stated:

> In construing an arbitration agreement, courts must "apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under California contract law, the court must "endeavor[] to effectuate the mutual intent of the parties." *City of El Cajon v. El Cajon Police Officers' Ass'n*, 49 Cal. App. 4th 64, 56 Cal. Rptr. 2d 723, 727 (1996). The "paramount consideration" is the "parties' objective intention at the time of contracting." *Porreco v. Red Top RV Center*, 216 Cal. App. 3d 113, 264 Cal. Rptr. 609, 612 (1989).

Wolsey, 144 F.3d at 1210.

state arbitration rules, because reliance on such extrinsic evidence flouted the California principle that only acts that occur "*before* a dispute has arisen" may be relied upon as evidence of the parties' intentions at the time of contracting. *See id.* at 1211-12 (citing *Heston v. Farmers Ins. Group*, 160 Cal. App. 3d 402, 206 Cal. Rptr. 585, 591 (1984)) (emphasis in *Heston*).

What explains the difference between *Wolsey* and the decision below, therefore, is not any disagreement about the meaning of *federal* law, but about the meaning of *California* law. And in this regard, it is significant to note that *Wolsey* did not have the benefit of the subsequent decision in *Mount Diablo Medical Center v. Health Net of California, Inc.*, 101 Cal. App. 4th 711, 124 Cal. Rptr. 2d 607 (2002), upon which both the district court and court of appeals in this case so heavily relied. But whatever the reason for the disagreement, there is no need for this Court to resolve a conflict between the Ninth Circuit and the Second Circuit on a question of California law.[6]

Similarly, *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), which the petition heralds as the "leading case" in the "majority" view (Pet. 15), rests on an interpretation of Pennsylvania law that, by definition, cannot "conflict" with the decision below. *Roadway* recognized that whether a choice-of-law provision incorporates state arbitration standards is "a matter of contract construction," and that contract law "is mostly state law" that "varies from

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[6] Petitioner itself has recognized that *Wolsey* turned on the Ninth Circuit's interpretation of *state* law. In its briefing in the court of appeals, petitioner urged the court to defer to the Ninth Circuit's interpretation of California law on the ground that where the circuit court in which the state in question has "essayed its own prediction of the course of state law, the federal courts of other circuits should defer to that holding." TIG Opening Br. at 19 (quotation and citation omitted). TIG's characterization of *Wolsey* in the petition is decidedly at odds with its characterization of *Wolsey* in the court below.

state to state." 257 F.3d at 293-94. *Roadway* also recognized that, in *Volt*, the Court "deferred to the California court's construction of its own State's law," whereas in *Mastrobuono* the Court construed the parties' agreement *de novo*, because it was "reviewing a federal court's construction of a choice-of-law clause." 257 F.3d at 295. *Roadway* plainly understood that the law being interpreted in *Volt* and *Mastrobuono*—whether under a "deferential" standard (as in *Volt*) or a *de novo* standard (as in *Mastrobuono*)—was *state* contract law.

Petitioner characterizes *Roadway* as holding that the interpretation of choice-of-law provisions in arbitration agreements is governed by "federal law." Pet. 15. But petitioner supports this assertion with a highly selective quotation from the decision. *Roadway* observed that, in the absence of the FAA, Pennsylvania arbitration rules undoubtedly would have governed the parties' arbitration. But the Court went on to say (in the passage cited by petitioner) that "this case is *not* governed by state law—it is governed by federal law." 257 F.3d at 294 (emphasis in original). Contrary to petitioner's contention, that assertion did not bespeak a belief that "contract construction" under the FAA is governed by federal law; it simply reflected the Third Circuit's recognition that the FAA requires arbitration agreements to be enforced according to their terms, and that those terms could incorporate either federal or state arbitration standards. But *Roadway* makes clear that ascertaining the "terms" of any particular contract is governed by *state*-law principles. 257 F.3d at 298.

Indeed, *all* of the other cases cited in the petition are appropriately and logically read as resting on the application of *state* contract law to the choice-of-law provisions in each case. These decisions purport to follow *Mastrobuono*, or to "distinguish" *Volt*, only in the sense that they engage in *de novo* review of the applicable state's contract law, which is

exactly what the district court and courts of appeals did here. *See, e.g., Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 339 (5th Cir. 2004); *Wolsey*, 144 F.3d at 1213-14; *Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380, 386 (4th Cir. 1998).

And that is entirely appropriate: Federal Rule of Civil Procedure 52 and *Mastrobuono* make clear that the courts of appeals *should* review *de novo* the district court's legal conclusions regarding questions of state law. *See also Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.") But these decisions evidence *no* conflict, let alone a "mature" conflict, on an issue of *federal* law. They stand only for the proposition that different courts applying different state laws to different contracts under different standards of review will reach different results—results that this Court does not sit to review. *Volt*, 489 U.S. at 474; *Dixon*, 344 U.S. at 144.

2. The petition also glosses over fundamental differences in the choice-of-law provisions at issue in each of the cases upon which it relies. According to petitioner, the question presented in this case is "[w]hether a *general* choice-of-law clause in a contract with an arbitration agreement that is subject to the [FAA] renders inapplicable federal arbitration rules and instead incorporates state arbitration rules." Pet. (i) (emphasis added). But the cases cited by petitioner as "conflicting" authorities do *not* all involve "general" choice-of-law provisions. Neither does this case.

For example, the choice-of-law clause in *Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380 (4th Cir. 1998), called for application of the "applicable common law of the states of the United States," which Porter claimed operated to incorporate Maryland arbitration principles. *Id.* at 382. Noting that this was hardly a generic arbitration clause, the

Fourth Circuit stated that "a choice-of-law provision specifying 'the applicable common law of the states of the United States would be a peculiar way indeed to say 'do not apply the Federal Arbitration Act.'" *Id.* at 383 n.5. Based on a *de novo* review of the contract, the court determined that the arbitration clause did not express an intent to apply Maryland arbitrability law.

Similarly, the choice-of-law provision in *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 995 (8th Cir. 1998), provided that the parties' agreement "shall be governed by and construed under the laws of the State of Minnesota" but only "to the extent not preempted by ERISA or other federal law." *Id.* at 994. The court of appeals opined that the fact the clause "specifically provides that Minnesota law must yield whenever preempted by federal law . . . cuts against the argument that the parties intended that the FAA not apply." *Id.*

Indeed, the choice-of-law provision in *this* case is not a "general" choice-of-law provision. The choice-of-law provision in the Reinsurance Agreement is subject to two express carve-outs: California law does *not* apply with respect to "rules regarding credit for reinsurance in which case the rules of all applicable states" apply. Pet. App. 14a. Nor does it apply with respect to any issue in which the Reinsurance Agreement and the laws of TIG's "domiciliary state" conflict, in which case the laws of the domiciliary state apply. *Id.* That the parties expressly enumerated exceptions to the choice-of-law provision—in an agreement negotiated and executed *after* this Court decided *Volt*—strongly suggests that they otherwise intended for all other California law (including state arbitration law) to apply. As the court of appeals concluded, "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules." Pet. App. 11a.

The peculiarities of the choice-of-law provision in this case make it impossible to assert that the decision below conflicts with cases addressing more "generic" choice-of-law provisions, such as the one at issue in *Roadway*. Indeed, *Roadway* expressly confined itself to cases involving a generic choice-of-law clause. *See* 257 F.3d at 297 ("The case might well be different if other contractual language or other evidence suggested that the parties intended to be bound by standards borrowed from state law."). That express qualification squarely rebuts petitioner's assertion that *Roadway* "conflicts" with the decision in this case, because it is impossible to divine how the Third Circuit would construe the peculiar choice-of-law provision at issue in this case. Differences in the particularities of choice-of-law provisions have proven to be dispositive in this area, even in decisions within the same circuit.[7] The uniqueness of the arbitration clause at issue in this case makes review by this Court particularly unwarranted, because any disposition necessarily will be fact-bound and tied to the particular terms of the Reinsurance Agreement.

3. Even assuming that the authorities cited in the petition purport to interpret *Mastrobuono* as establishing a *federal* rule precluding courts from construing "general" choice-of-law clauses to incorporate state arbitration law, the decision below would not give rise to a conflict worthy of

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[7] *Compare Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (clause stating that "the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal" evinced the parties' intent to depart from the FAA's vacatur standard) (emphasis omitted); *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 247 (5th Cir. 1998) (holding that a contract that specifically referred to the "Texas General Arbitration Act" expressed the parties' intent to borrow state arbitration rules), *with Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 341 (5th Cir. 2004) (holding that a choice-of-law clause stating that the law of Tennessee "shall govern the execution and performance of this agreement" did not incorporate state arbitration standards).

this Court's attention. The cases that ostensibly conflict with the decision below involve state arbitration rules that would be preempted by the FAA if the state rule applied of its own force, rather than by virtue of a choice-of-law clause. The decision below is not inconsistent with those holdings, because—as this Court squarely held in *Volt*—Section 1281.2(c) is not inconsistent with federal arbitration policy.

The Sixth Circuit's decision in *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926, 929 (6th Cir. 1998), exemplifies this line of cases. The Sixth Circuit held that a choice-of-law provision did not incorporate an Ohio rule that authorized courts to resolve in the first instance a claim that the contract containing the arbitration clause was fraudulently induced. Such a state rule clearly would have been preempted if it applied of its own force, rather than by virtue of a choice-of-law provision. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that such claims are for the arbitrator to decide). Indeed, it is difficult to imagine a state law that more squarely contradicts the FAA and its policies than a state rule precluding the arbitration of claims that the parties agreed to arbitrate. *See Doctor's Assocs.*, 517 U.S. at 688; *Southland Corp. v. Keating*, 465 U.S. 1, 31 (1984).

Similarly, in *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), the Eighth Circuit held that a "general" choice-of-law provision did not incorporate a state arbitration rule that subjected arbitral awards to heightened judicial review. Unlike federal law, which narrowly limits judicial review of arbitral awards (*see* 9 U.S.C. § 10), Minnesota law authorizes courts to review such awards *de novo*. *Id.* at 997. Thus, in *UHC Management Co.*, the state rule incorporated by the choice-of-law provision clearly conflicted with the FAA.

Likewise, in *Roadway*, the Third Circuit held that a "general" choice-of-law provision did not incorporate

Pennsylvania standards governing vacatur of an arbitrator's decision. As the Third Circuit recognized, the FAA and Pennsylvania's arbitration rules were in direct conflict: "[Pennsylvania's] vacatur standards for common law arbitration awards are so much narrower than the FAA's, [that] the choice of standards issue could well be *dispositive* in this case." *Roadway*, 257 F.3d at 291-92 & n.2 (emphasis added); *see also Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337 (5th Cir. 2004) (holding that "general" choice-of-law provision does not incorporate conflicting Tennessee vacatur standards).

All these decisions rest upon the fact that the state laws sought to be incorporated by the choice-of-law provision would have been preempted if they applied of their own force.[8] Indeed, several of these decisions have expressly predicated their holding on this fact. *See, e.g.*, *Ferro*, 142 F.3d at 934-35 ("*Volt* did not present a situation in which state and federal law were in conflict . . . In the instant case, however, . . . the relevant provisions of state law and the FAA appear to conflict.")

In contrast, this Court concluded in *Volt* that Cal. Civ. Proc. Code § 1281.2(c)(4) does not "undermine the goals and policies of the FAA" and that it "generally foster[s] the federal policy favoring arbitration." *Volt*, 489 U.S. at 477-78 & n.8. And it has repeatedly reaffirmed that conclusion. *See*

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[8] *See, e.g., Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380 (4th Cir. 1998) (holding that choice-of-law provision did not incorporate a Maryland rule that required courts to decide in the first instance whether claims are time-barred, because that rule conflicted with federal law); *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996) (reaching similar conclusion with respect to a New York law requiring courts to address limitations defenses in the first instance); *Kelley v. Michaels*, 59 F.3d 1050 (10th Cir. 1995) (holding that general choice-of-law provision does not incorporate New York's *Garrity* rule); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266 (9th Cir. 2002) (holding that choice-of-law provision did not incorporate state waiver rules that conflicted with federal law).

Doctor's Assocs., 517 U.S. at 688 (describing Section 1281.2(c)(4) as a rule that "determined only the efficient order of proceedings" but did not "affect the enforceability of the arbitration agreement itself"); *Waffle House*, 534 U.S. at 294 & n.5.

Thus, granting review in this case would do nothing to alleviate the purported "conflict" identified by petitioner. This Court has already held that it does not sit to review the very question of *state* law that petitioner challenges here, and it has likewise already concluded that "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration [such as Cal. Civ. Proc. Code § 1281.2(c)] . . . does not offend the rule of liberal construction set forth in *Moses H. Cone* . . . [or] . . . any other policy embodied in the FAA." *Volt*, 489 U.S. at 476. Even assuming that petitioner has identified a conflict involving *federal* law, that conflict focuses on whether "general" choice-of-law clauses incorporate state arbitration rules that conflict with the FAA. Because this case involves neither a "general" choice-of-law provision nor a state arbitration rule that conflicts with federal arbitration policy, this case is not a suitable vehicle for addressing that question.

III. Petitioner's Claim That The Court Of Appeals Should Have Deferred To The Arbitrator's Decision Does Not Raise Any Issue On Which The Circuits Have Divided And Otherwise Lacks Merit.

The petition also contends that review by this Court is warranted because the decision below "conflicts with decisions of this Court and the other courts of appeals holding that issues of contract interpretation should be made by, or determined with deference to, the arbitral panel." Pet. 26. But contrary to petitioner's suggestion, the circuits have *not* divided on these questions. Indeed, none of the cases cited by the petition (Pet. 29) even arguably addresses them.

In *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003), for example, the Eighth Circuit held that an arbitrator should decide in the first instance whether certain remedial limitations set forth in an arbitration agreement are enforceable, where the arbitration agreement in question gave the arbitrator "exclusive authority to resolve" disputes over the validity of any part of the agreement. *Id.* at 822. The Eleventh Circuit in *Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003), held that arbitrators and not courts should decide "the validity of the remedial restriction provisions" in the parties' arbitration agreement. *Id.* at 1032. And in *Pedcor Management Company, Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), the Fifth Circuit concluded that arbitrators rather than courts should decide in the first instance whether class arbitration is "available or forbidden" under the parties' arbitration agreement. *Id.* at 363.

These cases simply have nothing to do with whether an arbitrator rather than a court should determine in the first instance whether the parties' choice-of-law provision incorporates a state-law rule, such as Cal. Code. Proc. § 1281.2, authorizing courts to stay arbitration pending resolution of related litigation. Nor do they address whether courts should defer to an arbitrator's determination regarding whether a choice-of-law clause incorporates state arbitration rules. Petitioner's claim that a "conflict" exists does not withstand even mild scrutiny.

It also is far from clear that these questions are properly presented in *this* case. TIG did not raise the claim that the arbitrator's ruling on Security's stay motion was entitled to "deference" until it filed a petition for rehearing in the court of appeals. Neither the district court nor the court of appeals addressed it. Moreover, the arbitrators *never* decided (one way *or* the other) whether the Reinsurance Agreement incorporates California arbitration law. Security did not

predicate its stay request *to the arbitration panel* on California Civil Procedure Code § 1281.2, as that section authorizes *courts* to stay arbitration pending resolution of related litigation. Instead, it based its stay request on pragmatic case management considerations. The arbitral panel denied the stay request without explanation. Thus, no arbitral determination was *ever* made on the issue whether the choice-of-law provision incorporates Section 1281.2—and thus there is no arbitral decision to which deference could conceivably be owed.

Petitioner's contention that the arbitrators should decide such issues in the first instance, or that their decisions on such issues are entitled to deference, is also inconsistent with this Court's precedents. The very purpose of Section 1281.2 is to provide a mechanism through which parties can *defer* arbitration while related litigation remains pending. It is logical to assume that the parties would have intended to have a court resolve disputes about the validity of such a stay provision, because referring the decision to an arbitrator would, by definition, eviscerate the protections the provision was intended to provide—*i.e.*, it would *require* the parties to initiate proceedings in an arbitral forum at the same time they are litigating in a judicial forum.

It is precisely these types of issues that courts—*not* arbitrators—should decide in the first instance. As this Court recognized in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), courts should decide "gateway issues of arbitrability" where the "contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought . . . that an arbitrator would do so," and "where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84; *see also First Options*, 514 U.S. at 941 (same). Those considerations plainly apply here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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